No. 83-1968 (19)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

LACY H. THORNBURG, *et al.*,

Appellants,

v.

RALPH GINGLES, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

BRIEF FOR APPELLEES

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QUESTIONS PRESENTED

(1) Does section 2 of the Voting Rights Act require proof that minority voters are totally excluded from the political process?

(2) Does the election of a minority candidate conclusively establish the existence of equal electoral opportunity?

(3) Did the district court hold that section 2 requires either proportional representation or guaranteed minority electoral success?

(4) Did the district court correctly evaluate the evidence of racially polarized voting?

(5) Was the district court's finding of unequal electoral opportunity "clearly erroneous"?

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STATEMENT OF THE CASE[1]

This is an action challenging the districting plan adopted in 1982 for the election of the North Carolina legislature. North Carolina has long had the smallest percentage of blacks in its state legislature of any state with a substantial black population.[2] Prior to this litigation no more than 4 of the 120 state representatives, or 2 of the 50 state

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1 The opinion of the district court as reprinted in the appendix to the Jurisdictional Statement has two significant typographical errors. The Appendix at J.S. 34a and 36a states, "Since then two black citizens have run successfully in the (Mecklenburg Senate district) ..." and "In Halifax County, black citizens have run successfully..." Both sentences of the opinion actually read "have run unsuccessfully." (Emphasis added). Due to these and other errors, the opinion has been reprinted in the Joint Appendix, at JA5-JA58.

2 See Joint Center for Political Studies, National Roster of Black Elected Officials (1984) 14, 16-17; JA Ex. Vol. I, Ex. 1.

senators, were black.[3] Although blacks are 22.4% of the state population, the number of blacks in either house of the North Carolina legislature had never exceeded 4%. The first black was not elected to the House until 1968, and the first black state senator was not elected until 1974. North Carolina makes greater use of at large legislative elections than most other states; under the 1982 districting plan 98 of the 120 representatives and 30 of the 50 state senators were to be chosen from multi-member districts.[4]

In July 1981, following the 1980 census, North Carolina initially adopted a redistricting plan involving a total of 148 multi-member and 22 single member dis-

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3 Stip. 96, JA 94-5.

4 Stip. Ex. BB and EE, Chapters 1 and 2 Sess. Laws of 2nd Extra Session 1982, JA 67.

tricts.[5] Under this plan every single House and Senate district had a white majority.[6] There was a population deviation of 22% among the proposed districts.

Forty of North Carolina's 100 counties are covered by section 5 of the Voting Rights Act; accordingly, the state was required to obtain preclearance of those portions of the redistricting plan which affected those 40 counties. North Carolina submitted the 1981 plan to the Attorney General, who entered objections to both the House and Senate plans, having concluded that "the use of large multi-member districts effectively submerges cognizable concentrations of black

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5 Stip. Ex. D and F, Chapters 800 and 821 Sess. Laws 1981, JA 61.

6 The opinion states one district was majority black in population, JA7, referring to the second 1981 plan, enacted in October after this lawsuit was filed. Stip. Ex. L, JA 62.

population into a majority white electorate." Stip. Ex. N and O, JA63. For similar reasons, the Attorney General also objected to Article 2 Sections 3(3)and 5(3) of the North Carolina Constitution, adopted in 1967 but not submitted for preclearance until after this lawsuit was filed, which forbade the subdivision of counties in the formation of legislative districts. Stip. 22, JA 63.

Appellees filed this action in September 1981, alleging, inter alia, that the 1981 redistricting plan violated section 2 of the Voting Rights Act and the Fourteenth Amendment. Following the objections of the Attorney General under section 5, the state adopted two subsequent redistricting plans; the complaint was supplemented to challenge the final plans, which were adopted in April, 1982. Stips. 42,43; JA 67. In June 1982 Congress

amended section 2 to forbid election practices with discriminatory results, and the complaint was amended to reflect that change; thereafter the litigation focused primarily on the application of the amended section 2 to the circumstances of this case. Appellees contended that six of the multi-member districts had a discriminatory result which violated section 2, and that the boundaries of one single member district also violated that provision of the Voting Rights Act.

After an eight day trial before Judges J. Dickson Phillips, Jr., Franklin T. Dupree, Jr., and W. Earl Britt, Jr., the court unanimously upheld plaintiffs' section 2 challenge. The court enjoined elections in the challenged districts pending court approval of a districting plan which did not violate section 2.[7] By

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[7] Appellees did not challenge all multi-

subsequent orders, the court approved the State's proposed remedial districts for six of the seven challenged districts. The court entered a temporary order providing for elections in 1984 only in one district, former House District No. 8, after appellants' proposed remedial plan was denied preclearance under section 5. The remedial aspects of the litigation have not been challenged and are not before this Court.

On appeal appellants have disputed the correctness of the three judge district court's decision regarding the legality of five of the six disputed multi-member districts. Although appellants have referred to some facts from

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member districts used by the state and the district court did not rule that the use of multi-member districts is per se illegal. The district court's order leaves untouched 30 multi-member districts in the House and 13 in the Senate.

House District No. 8 and Senate District No. 2, they have made no argument in their Brief that is pertinent to the lower court's decision concerning either of these districts.[8] Like the United States, we assume that the correctness of the decision below regarding House District No. 8 and Senate District No. 2 is not within the scope of this appeal.

THE FINDINGS OF THE DISTRICT COURT

The gravamen of appellees' claim under section 2 is that minority voters in the challenged multi-member districts do not have an equal opportunity to participate effectively in the political process,

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8 The Court did not note probable jurisdiction as to Question II, the question in the Jurisdictional Statement concerning these two districts, and even the Solicitor General concedes that there is no basis for appeal as to these two districts. U.S. Br. 11.

and particularly that they do not have an equal opportunity to elect candidates of their choice. Five of the challenged 1982 multi-member districts were the same as had existed under the 1971 plan, and the one that was different, House District 39, was only modified slightly. The election results in those districts are undisputed. Until 1972 no black since Reconstruction had been elected to the legislature from any of the counties in question. The election results since 1972 are set forth on the table on the opposite page. As that table indicates, prior to 1982 no more than 3 of the 32 legislators elected in any one election in the challenged districts were black; in 1981, when this action was filed, five of the seven districts were represented by all white delegations, and three of the districts still had never elected a black legisla-

BLACK CANDIDATES ELECTED

1972-1982

District (Number of Seats)	Prior to 1972	1972	1974	1976	1978	1980	1982
House 8 (4)	0	0	0	0	0	0	0
House 21 (6)	0	0	0	0	0	1	1
House 23 (3)	0	1	1	1	1	1	1
House 36 (8)	0	0	0	0	0	0	1
House 39 (5)	0	0	1	1	0	0	2
Senate 2*(2)	0	0	0	0	0	0	0
Senate 22 (4)	0	0	1	1	1	0	0
TOTAL (32)	0	1	3	3	2	2	5

Source: Stip. 95
JA 93-94

* Senate District 2 was part of a two member district through the 1980 election; but no county in Senate District 2 was ever in a district which elected a black Senator.

tor. The black population of the challenged districts ranged from 21.8% to 39.5%. JA 21.

The district court held on the basis of this record and its examination of election results in local offices that "[t]he overall results achieved to date ... are minimal." JA 39. The court noted that, following the filing of this action, the number of successful black legislative candidates rose sharply. It concluded, however, that the results of the 1982 election were an aberration unlikely to recur again. It emphasized in particular that in a number of instances "the pendency of this very litigation worked a one-time advantage for black candidates in the form of unusual organized political support by white leaders concerned to forestall single-member districting." JA 39 n.27.

The district court identified a number of distinct practices which put black voters at a comparative disadvantage when placed in the six majority white multi-member districts at issue. The court noted, first, that the proportion of white voters who ever voted for a black candidate was extremely low; an average of 81% of white voters did not vote for any black candidate in primary elections involving both black and white candidates, and those whites who did vote for black candidates ranked them last or next to last. JA 42. The court noted that in none of the 53 races in which blacks ran for office did a majority of whites ever vote for a black candidate, and the sole election in which 50% voted for the black candidate was one in which that candidate was running unopposed. JA. 43-48. The district court concluded that this pattern

of polarized voting put black candidates at a severe disadvantage in any race against a white opponent.

The district court also concluded that black voters were at a comparative disadvantage because the rate of registration among eligible blacks was substantially lower than among whites. This disparity further diminished the ability of black voters to make common cause with sufficient numbers of like minded voters to be able to elect candidates of their choice. The court found that these disparities in registration rates were the lingering effect of a century of virulent official hostility towards blacks who sought to register and vote. The tactics adopted for the express purpose of disenfranchising blacks included a poll tax, a literacy test with a grandfather clause, as well as a number of devices

which discouraged registration by assuring the defeat of black candidates. JA 25-26. When the use of the state literacy test ended after 1970, whites enjoyed a 60.6% to 44.6% registration advantage over blacks. Thereafter registration was kept inaccessible in many places, and a decade later the gap had narrowed only slightly, with white registration at 66.7%, and black registration at 52.7%. JA 26 and n.22.

The trial court held that the ability of black voters to elect candidates of their choice in majority white districts was further impaired by the fact that black voters were far poorer, and far more often poorly educated, than white voters. JA 28-31. Some 30% of blacks had incomes below the poverty line, compared to 10% of whites; conversely, whites were twice as likely as blacks to earn over $20,000 a

year. Almost all blacks over 30 years old attended inferior segregated schools. JA 29. The district court concluded that this lack of income and education made it difficult for black voters to elect candidates of their choice. JA 31. n.23. The record on which the court relied included extensive testimony regarding the difficulty of raising sufficient funds in the relatively poor black community to meet the high cost of an at-large campaign, which has to reach as many as eight times as many voters as a single district campaign. (See notes 107-109, infra).

The ability of minority candidates to win white votes, the district court found, was also impaired by the common practice on the part of white candidates of urging whites to vote on racial lines. JA 33-34. The record on which the court relied

included such appeals in campaigns in 1976, 1980, 1982, and 1983. (See page 115, infra). In both 1980 and 1983 white candidates ran newspaper advertisements depicting their opponents with black leaders. In 1983 Senator Helms denounced his opponent for favoring black voter registration, and in a 1982 congressional run-off white voters were urged to go to the polls because the black candidate would be "bussing" [sic] his "block" [sic] vote. (See pp. 116-18, infra).

The district court, after an exhaustive analysis of this and other evidence, concluded that the challenged multi-member districts had the effect of submerging black voters as a voting minority in those districts, and thus affording them "less opportunity than ... other members of the

electorate to participate in the political process and to elect representatives of their choice." JA 53-54.[9]

SUMMARY OF ARGUMENT

Section 2 of the Voting Rights Act was amended in 1982 to establish a nationwide prohibition against election practices with discriminatory results. Specifically prohibited are practices that afford minorities "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice". (Emphasis added). In assessing a claim of unequal electoral opportunity, the courts are required to consider the "totality of circumstances". A finding of unequal

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[9] Based on similar evidence the court made a parallel finding concerning the fracturing of the minority community in Senate District No. 2. JA 54.

opportunity is a factual finding subject to Rule 52. Anderson v.City of Bessemer City, ___ U.S. ___ (1985).

The 1982 Senate Report specified a number of specific factors the presence of which, Congress believed, would have the effect of denying equal electoral opportunity to black voters in a majority white multi-member district. The three-judge district court below, in an exhaustive and detailed opinion, carefully analyzed the evidence indicating the presence of each of those factors. In light of the totality of circumstances established by that evidence, the trial court concluded that minority voters were denied equal electoral opportunity in each of the six challenged multi-member districts. The court below expressly recognized that section 2 did not require proportional representation. JA 17.

Appellants argue here, as they did at trial, that the presence of equal electoral opportunity is conclusively established by the fact blacks won 5 out of 30 at-large seats in 1982, 14 months after the complaint was filed. Prior to 1972, however, although blacks had run, no blacks had ever been elected from any of these districts, and in the election held immediately prior to the commencement of this action only 2 blacks were elected in the challenged districts. The district court properly declined to hold that the 1982 elections represented a conclusive change in the circumstances in the districts involved, noting that in several instances blacks won because of support from whites seeking to affect the outcome of the instant litigation. JA 39 n.27.

The Solicitor General urges this Court to read into section 2 a per se rule that a section 2 claim is precluded as a matter of law in any district in which blacks ever enjoyed "proportional representation", regardless of whether that representation ended years ago, was inextricably tied to single shot voting, or occurred only after the commencement of the litigation. This per se approach is inconsistent with the "totality of circumstances" requirement of section 2, which precludes treating any single factor as conclusive. The Senate Report expressly stated that the election of black officials was not to be treated, by itself, as precluding a section 2 claim. S. Rep. No. 97-417, 29 n.115.

The district court correctly held that there was sufficiently severe polarized voting by whites to put minority

voters and candidates at an additional disadvantage in the majority white multi-member districts. On the average more than 81% of whites do not vote for black candidates when they run in primary elections. JA 42. Black candidates receiving the highest proportion of black votes ordinarily receive the smallest number of white votes. Id.

ARGUMENT

I. SECTION 2 PROVIDES MINORITY VOTERS AN EQUAL OPPORTUNITY TO ELECT REPRESENTATIVES OF THEIR CHOICE

Two decades ago Congress adopted the Voting Rights Act of 1965 in an attempt to end a century long exclusion of most blacks from the electoral process. In 1981 and 1982 Congress concluded that, despite substantial gains in registration since 1965, minorities still did not enjoy the same opportunity as whites to parti-

cipate in the political process and to elect representatives of their choice,[10] and that further remedial legislation was necessary to eradicate all vestiges of discrimination from the political process.[11] The problems identified by Congress included not only the obvious impediments to minority participation, such as registration barriers, but also election schemes such as those at-large elections which impair exercise of the franchise and dilute the voting strength of minority citizens. Although some of these practices had been corrected in certain jurisdictions by operation of the preclearance provisions of Section 5, Congress con-

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10 S. Rep. No. 97-417, 97th Cong., 2d Sess., 34 (1982) (hereinafter cited as "Senate Report").

11 Senate Report 40; H.R. Rep. No. 97-227, 97th Cong., 1st Sess., 31 (1981) (hereinafter cited as "House Report).

cluded that their eradication required the adoption, in the form of an amendment to Section 2, of a national[12] prohibition against practices with discriminatory results.[13] Section 2 protects not only the right to vote, but also "the right to have the vote counted at full value without dilution or discount." Senate Report 19.

A. Legislative History of the 1982 Amendment to Section 2

The present language of section 2 was adopted by Congress as part of the Voting Rights Act Amendments of 1982. (96 Stat. 131). The 1982 amendments altered the Voting Rights Act in a number of ways,

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12 House Report, 28; Senate Report 15.

13 Appellants and the Solicitor General concede that the framers of the 1982 amendments established a standard of proof in vote dilution lawsuits based on discriminatory results alone. Appellants' Br. at 16; U.S. Brief II at 8, 13.

extending the pre-clearance requirements of section 5, modifying the bailout requirements of section 4, continuing until 1992 the language assistance provisions of the Act, and adding a new requirement of assistance to blind, disabled or illiterate voters. Congressional action to amend section 2 was prompted by this Court's decision in Mobile v. Bolden, 446 U.S. 55, 60-61 (1980), which held that the original language of section 2, as it was framed in 1965, forebade only election practices adopted or maintained with a discriminatory motive. Congress regarded the decision in Bolden as an erroneous interpretation of section 2,[14] and thus acted to amend the language to remove any such intent requirement.

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[14] House Rep. at 29; Senate Report at 19.

Legislative proposals to extend the Voting Rights Act in 1982 included from the outset language that would eliminate the intent requirement of Bolden and apply a totality of circumstances test to practices which merely had the effect of discriminating on the basis of race or color.[15] Support for such an amendment was repeatedly voiced during the extensive House hearings and much of this testimony was concerned with at-large election plans that had the effect of diluting the impact of minority votes.[16] On July 31 the House

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[15] H.R. 3112, 97th Cong., 1st Sess., § 201; H.R. 3198, 97th Cong., 1st Sess., § 2.

[16] The three volumes of Hearings before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee, 97th Cong., 1st Sess., are hereinafter cited as "House Hearings." Testimony regarding the proposed amendment to section 2 can be found at 1 House Hearings 18-19, 138, 197, 229, 365, 424-25, 454, 852; 2 House Hearings 905-07, 993-95, 1279, 1361, 1641; 3 House Hearings 1880, 1991, 2029-32, 2036-37, 2127-28, 2136, 2046-47, 2051-58.

Judiciary Committee approved a bill that extended the Voting Rights Act and included an amendment to section 2 to remove the intent requirement imposed by Bolden.[17] The House version included an express disclaimer to make clear that the mere lack of proportional representation would not constitute a violation of the law, and the House Report directed the courts not to focus on any one factor but

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17 House Report, 48:

> "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any state or political subdivision [to deny or abridge] in a manner which results in a denial or abridgment of the right of any citizen to vote on account of race or color, or in contravention of the guarantees set forth in section 4(b)(2). The fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, in and of itself, constitute a violation of this section."

to look at all the relevant circumstances in assessing a Section 2 claim. H. Rep. at 30.

The House Report set forth the committee's reasons for disapproving any intent requirement, and described a variety of practices, particularly the use of at-large elections[18] and limitations on the times and places of registration,[19] with whose potentially discriminatory effects the Committee was particularly concerned.

On the floor of the House the proposed amendment to section 2 was the subject of considerable debate. Representative Rodino expressly called the attention of the House to this portion of the bill,[20] to which he and a number of other speakers

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18 House Report, 17-19, 30.

19 Id. 14, 16, 17, 30, 31 n.105.

20 128 Cong. Rec. H 6842 (daily ed. Oct. 2, 1981).

gave support.[21] Proponents of section 2 emphasized its applicability to multi-member election districts that diluted minority votes, and to burdensome registration and voting practices.[22] A number of speakers opposed the proposed alteration to section 2,[23] and Representative Bliley moved that the amendment to section 2 be deleted from the House bill. The Bliley

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21 128 Cong. Rec. H 6842 (Rep. Rodino), H 6843 (Rep. Sensenbrenner), H 6877 (Rep. Chisholm) (daily ed., Oct. 2, 1981); 128 Cong. Rec. H 7007 (Rep. Fascell)(daily ed., Oct. 5, 1981).

22 128 Cong. Rec. H 6841 (Rep. Glickman; dilution), H 6845-6 (Rep. Hyde; registration barriers), H 6847 (Rep. Bingham; voting practices, dilution); H 6850 (Rep. Washington, registration and voting barriers); H 6851 (Rep. Fish, dilution) (daily ed., Oct. 2, 1981).

23 128 Cong. Rec. H 6866 (Rep. Collins), H 6874 (Rep. Butler)(daily ed., Oct. 2, 1981); 128 Cong. Rec. H 6982-3 (Rep. Bliley), H 6984 (Rep. Butler, (Rep. McClory), H 6985 (Rep. Butler)(daily ed., Oct. 5, 1981).

amendment was defeated on a voice vote.[24] Following the rejection of that and other amendments the House on October 5, 1981 passed the bill by a margin of 389 to 24.[25]

On December 16, 1981, a Senate bill essentially identical to the House passed bill was introduced by Senator Mathias. The Senate bill, S.1992, had a total of 61 initial sponsors, far more than were necessary to assure passage. 2 Senate Hearings 4, 30, 157. The particular subcommittee to which S.1992 was referred, however, was dominated by Senators who were highly critical of the Voting Rights Act amendments. After extensive hear-

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24 128 Cong. Rec. H 6982-85 (daily ed., Oct. 5, 1981).

25 Id. at H6985.

ings,[26] most of them devoted to section 2, the subcommittee recommended passage of S.1992, but by a margin of 3-2 voted to delete the proposed amendment to section 2. 2 Senate Hearings 10. In the full committee Senator Dole proposed language which largely restored the substance of S. 1992; included in the Dole proposal was the language of section 2 as it was ultimately adopted. The Senate Commmittee issued a lengthy report describing in detail the purpose and impact of the section 2 amendment. Senate Report 15-42.

The report expressed concern with two distinct types of practices with potentially discriminatory effects--first, restrictions on the times, places or

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26 Id. Hearings before the Subcommitee on the Constitution of the Senate Judiciary Committee on S.53, 97th Cong., 2d Sess. (1982)(hereinafter cited as "Senate Hearings").

methods of registration or voting, the burden of which would fall most heavily on minorities,[27] and, second, election systems such as those multi-member districts which reduced or nullified the effectiveness of minority votes, and impeded the ability of minority voters to elect candidates of their choice.[28] The Senate debates leading to approval of the section 2 amendment reflected similar concerns.[29]

The Senate report discussed the various types of evidence that would bear on a section 2 claim, and insisted that the courts were to consider all of this evidence and that no one type of evidence

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27 Senate Report, 30 n.119.

28 Senate Report, 27-30.

29 128 Cong. Rec. S 6783 (daily ed. June 15, 1982)(Sen. Dodd); 128 Cong. Rec. S 7111 (daily ed. June 18, 1982) (Sen. Metzenbaum), S7113 (Sen. Bentsen), S 7116 (Sen. Weicker), S 7137 (Sen. Robert Byrd).

should be treated as conclusive.[30] Both the Senate Report and the subsequent debates make clear that it was the intent of Congress, in applying the amended section 2 to multi-member districts, to reestablish what it understood to be the totality of circumstances test that had been established by White v.Regester, 412 U.S. 755 (1973),[31] and that had been elaborated upon by the lower courts in the years between White and Bolden.[32] The most important and frequently cited of the courts of appeals dilution cases was Zimmer v. McKeithen,[33]

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30 Senate Report, 23, 27.

31 Senate Report, 2, 27, 28, 30, 32.

32 Senate Report, 16, 23, 23 n.78, 28, 30, 31, 32.

33 Zimmer was described by the Senate Report as a "seminal" decision, id. at 22, and was cited 9 times in the Report. Id. at 22, 24, 24 n.86, 28 n.112, 28 n.113, 29 n.115, 29 n.116, 30, 32, 33. Senator DeConcini, one of the framers of the Dole proposal, described Zimmer as "[p]erhaps the clearest expression of the standard of

485 F.2d 1297 (5th Cir. 1973)(en banc), aff'd sub nom. East Carroll Parish School Board v. Marshall, 424 U.S. 636 (1976). The decisions applying White are an important source of guidance in a section 2 dilution case.

The legislative history of section 2 focused repeatedly on the possibly discriminatory impact of multi-member districts. Congress was specifically concerned that, if there is voting along racial lines, black voters in a majority white multi-member district would be unable to compete on an equal basis with whites for a role in electing public officials. Where that occurs, the white majority is able to determine the outcome of elections and white candidates are able

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proof in these vote dilution cases." 128 Cong. Rec. S6930 (daily ed. June 17, 1982).

to take positions without regard to the votes or preferences of black voters, rendering the act of voting for blacks an empty and ineffective ritual. The Senate Report described in detail the types of circumstances, based on the White/Zimmer factors, under which blacks in a multi-member district would be less able than whites to elect representatives of their choice. Senate Report, 28-29.

The Solicitor General, in support of his contention that a section 2 claim may be decided on the basis of a single one of the seven Senate Report factors--electoral success--regardless of the totality of the circumstances, offers an account of the legislative history of section 2 which is, in a number of respects, substantially inaccurate. First, the Solicitor asserts that, when the amended version of S. 1992 was reported to the full Judiciary

Committee, there was a "deadlock." U.S. Br. I, 8; Br. II, 8 n.12. The legislative situation on May 4, 1982 when the Dole proposal was offered, could not conceivably be characterized as a "deadlock," and was never so described by any supporter of the proposal. The entire Judiciary Committee favored reporting out a bill amending the Voting Rights Act, and fully two thirds of the Senate was committed to restoring the House results test if the Judiciary Committee failed to do so. Critics of the original S.1992 had neither the desire nor the votes to bottle up the bill in Committee,[34] and clearly lacked the votes to defeat the section 2 amendment on the floor of the Senate. The leading

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34 2 Senate Hearings 69 (Sen. Hatch) ("[W]hatever happens to the proposed amendment, I intend to support favorable reporting of the Voting Rights Act by this Committee")

Senate opponent of the amendment acknowledged that passage of the amendment had been foreseeable "for many months" prior to the full Committee's action.[35] Senator Dole commented, when he offered his proposal, that "without any change the House bill would have passed." 2 Senate Hearings 57. Both supporters[36] and opponents[37] of section 2 alike agreed that the

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35 2 Senate Hearings 69 (Sen. Hatch).

36 Senate Report, 27 (section 2 "faithful to the basic intent" of the House bill); 2 Senate Hearings 60 (Sen. Dole)("[T]he compromise retains the results standards of the Mathias/Kennedy bill. However, we also feel that the legislation should be strengthened with additional language delineating what legal standard should apply under the results test..."") (Emphasis added), 61 (Sen. Dole)(language "strengthens the House-passed bill") 68 (Sen. Biden)(new language merely "clarifies" S.1992 and "does not change much"), 128 Cong. Rec. S6960-61 (daily ed. June 17, 1982) (Sen. Dole); 128 Cong. Rec. H3840 (daily ed. June 23, 1982)(Rep. Edwards).

37 2 Senate Hearings 70 (Sen. Hatch)("The proposed compromise is not a compromise at all, in my opinion. The impact of the

language proposed by Senator Dole and ultimately adopted by Congress was intended not to water down the original House bill, but merely to spell out more explicitly the intended meaning of legislation already approved by the House.[38]

The Solicitor urges the Court to give little weight to the Senate Report accompanying S.1992, describing it as

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proposed compromise is not likely to be one whit different than the unamended House measure" relating to section 2; Senate Report, 95 (additional views of Sen. Hatch); 128 Cong. Rec. (daily ed. June 9, 1982) S 6515, S.6545 (Sen. Hatch); 128 Cong. Rec. (daily ed. June 10, 1982) S 6725 (Sen. East); 128 Cong. Rec. (daily ed., June 15, 1982) S.6786 (Sen. Harry Byrd).

38 The compromise language was designed to reassure Senate cosponsors that the White v. Regester totality of circumstances test endorsed in the House, and espoused throughout the Senate hearings by supporters of the House passed bill, would be codified in the statute itself. 2 Senate Hearings 60; Senate Report, 27.

merely the work of a faction. U.S. Br. I, 8 n.6; U.S. Br. II, 8 n.12, 24 n.49. Nothing in the legislative history of section 2 supports the Solicitor's suggestion that this Court should depart from the long established principle that committee reports are to be treated as the most authoritative guide to congressional intent. Garcia v. United States, 105 S.Ct. 479, 483 (1984). Senator Dole, to whose position the Solicitor would give particular weight, prefaced his Additional Views with an acknowledgement that "[T]he Committee Report is an accurate statement of the intent of S.1992, as reported by the Committee."[39] On the floor of the Senate both supporters and opponents of

39 Senate Report 193; see also id. at 196 ("I express my views not to take issue with the body of the report") 199 ("I concur with the interpretation of this action in the Committee Report."), 196-98 (additional views of Sen. Grassley).

section 2 agreed that the Committee report constituted the authoritative explanation of the legislation.[40] Until the filing of its briefs in this case, it was the consistent contention of the Department of Justice that in interpreting section 2 "[t]he Senate Report... is entitled to greater weight than any other of the legislative history."[41] Only in the spring of 1985 did the Department reverse its position and assert that the Senate report was merely the view of one faction that

40 128 Cong. Rec. S6553 (daily ed., June 9, 1982)(Sen. Kennedy); S6646-48 (daily ed. June 10, 1982) (Sen. Kennedy); S6781 (Sen. Dole)(daily ed. June 15, 1982); S6930-34 (Sen. DeConcini), S6941-44, S6967 (Sen. Mathias), S6960, 6993 (Sen. Dole), S6967 S6991-93 (Sen. Stevens), S6995 (Sen. Kennedy)(daily ed. June 17, 1982); S7091-92 (Sen. Hatch), S7095-96 (Sen. Kennedy)(daily ed., June 18, 1982).

41 Post-Trial Brief for the United States of America, County Council of Sumter County, South Carolina v. United States, No. 82-0912 (D.D.C.), 31.

"cannot be taken as determinative on all counts." U.S. Br. I, p. 24, n.49. This newly formulated account of the legislative history of section 2 is clearly incorrect.

The Solicitor urges that substantial weight be given to the views of Senator Hatch,[42] and his legislative assistant.[43] In fact, however, Senator Hatch was the most intransigient congressional critic of amended section 2, and he did not as the

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42 In an amicus brief in City Council of the City of Chicago v. Ketchum, No. 84-627, referred to in his brief in this case, U.S. Br. II 21 n.43, the Solicitor asserts that Senator Hatch "supported the compromise adopted by Congress." Brief for United States as Amicus, 16 n.15.

43 The Solicitor cites for a supposedly authoritative summary of the origin and meaning of section 2 an article written by Stephen Markman. U.S. Br. II, 9, 10. Mr. Markman is the chief counsel of the Judiciary Subcommittee chaired by Senator Hatch, and was Senator Hatch's chief assistant in Hatch's unsuccessful opposition to the amendment to section 2.

Solicitor suggests support the Dole proposal. On the contrary, Senator Hatch urged the Judiciary Committee to reject the Dole proposal,[44] and was one of only four Committee members to vote against it.[45] Following the Committee's action, Senator Hatch appended to the Senate Report Additional Views objecting to this modified version of section 2.[46] On the floor of the Senate, Senator Hatch supported an unsuccessful amendment that would have struck from the bill the amendment to section 2 that had been adopted by the Committee,[47] and again denounced the language which eventually

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44 2 Senate Hearings 70-74.

45 Id. 85-86.

46 Senate Report, 94-101.

47 128 Cong. Rec. S6965 (daily ed. June 17, 1982).

became law.[48]

Finally, the Solicitor urges that the views of the President regarding section 2 should be given "particular weight" because the President endorsed the Dole proposal, and his "support for the compromise ensured its passage." U.S. Br. I, 8 n.6. We agree with the Solicitor General that the construction of section 2 which the Department of Justice now proposes in its amicus brief should be considered in light of the role which the Administration played in the adoption of this legislation. But that role is not, as the Solicitor asserts, one of a key sponsor of the legislation, without whose

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48 Immediately prior to the final vote on the bill, Senator Hatch stated, "these amendments promise to effect a destructive transformation in the Voting Rights Act." 128 Cong. Rec. S7139 (daily ed. June 18, 1982); 128 Cong. Rec. (daily ed. June 9, 1982) S6506-21.

support the bill could not have been adopted. On the contrary, the Administration in general, and the Department of Justice in particular, were throughout the legislative process among the most consistent, adamant and outspoken opponents of the proposed amendment to section 2.

Shortly after the passage of the House bill, the Administration launched a concerted attack on the decision of the House to amend section 2. On November 6, 1981, the President released a statement denouncing the "new and untested 'effects' standard," and urging that section 2 be limited to instances of purposeful discrimination, 2 Senate Hearings 763, a position Mr. Reagan strongly reaffirmed at a press conference on December 17.[49] When in January 1982 the Senate commenced

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49 New York Times, Dec. 18, 1981, p. B7, col. 4.

hearings on proposed amendments to the Voting Rights Act, the Attorney General appeared as the first witness to denounce section 2 as "just bad legislation," objecting in particular to any proposal to apply a results standard to any state not covered by section 5. 1 Senate Hearings 70-97. At the close of the Senate Hearings in early March the Assistant Attorney General for Civil Rights gave extensive testimony in opposition to the adoption of the totality of circumstances/ results test. Id., at 1655 et seq. Both Justice Department officials made an effort to solicit public opposition to the results test, publishing critical analyses in several national newspapers[50] and, in the

50 2 Senate Hearings 770 (Assistant Attorney General Reynolds) (Washington Post), 774 (Attorney General Smith) (Op-ed article, New York Times), 775 (Attorney General Smith) (Op-ed article, Washington Post).

case of the Attorney General, issuing a warning to members of the United Jewish Appeal that adoption of a results test would lead to court ordered racial quotas.[51] The White House did not endorse the Dole proposal until after it had the support of 13 of the 18 members of the Judiciary Committee and Senator Dole had warned publicly that he had the votes necessary to override any veto.[52]

Having failed to persuade Congress to reject a results standard in section 2, the Department of Justice now seeks to persuade this court to adopt an interpretation of section 2 that would severely limit the scope of that provision. Under these unusual circumstances the Depart-

51 Id. at 780.

52 Los Angeles Times, May 4, 1982, p. 1; Wall Street Journal, May 4, 1982, p. 8; 2 Senate Hearings 58.

ment's views do not appear to warrant the weight that might ordinarily be appropriate. We believe that greater deference should be given to the views expressed in an amicus brief in this case by Senator Dole and the other principal cosponsors of section 2.

B. Equal Electoral Opportunity is the Statutory Standard

Section 2 provides that a claim of unlawful vote dilution is established if, "based on the totality of circumstances," members of a racial minority "have less opportunity than other members to participate in the political process and to elect representatives of their choice."[53] In the instant case the district court concluded that minority voters lacked such an equal opportunity. JA 53-54.

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53 42 U.S.C. § 1973, Section 2(b) is set forth in the opinion below, JA 13.

Both appellants and the Solicitor General suggest, however, that section 2 is limited to those extreme cases in which the effect of an at-large election is to render virtually impossible the election of public officials, black or otherwise, favored by minority voters. Thus appellants assert that section 2 forbids use of a multi-member district when it "effectively locks the racial minority out of the political forum," A. Br. 44, or "shut[s] racial minorities out of the electoral process" Id. at 23. The Solicitor invites the Court to hold that section 2 applies only where minority candidates are "effectively shut out of the political process". U.S. Br. II 27; see also id. at 11. On this view, the election of even a single black candidate would be fatal to a section 2 claim.

The requirements of section 2, however, are not met by an election scheme which merely accords to minorities some minimal opportunity to participate in the political process. Section 2 requires that "the political processes leading to nomination or election" be, not merely open to minority voters and candidates, but "equally open". (Emphasis added). The prohibition of section 2 is not limited to those systems which provide minorities with no access whatever to the political process, but extends to systems which afford minorities "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." (Emphasis added).

This emphasis on equality of opportunity was reiterated throughout the legislative history of section 2. The

Senate report insisted repeatedly that section 2 required equality of political opportunity.[54] Senator Dole, in his

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[54] S. Rep. 97-417, p. 16 ("equal chance to participate in the electoral process"; "equal access to the electoral process") 20 ("equal access to the political process"; at-large elections invalid if they give minorities "less opportunity than ... other residents to participate in the political processes and to elect legislators of their choice"), 21 (plaintiffs must prove they "had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice"), 27 (denial of "equal access to the political process"), 28 (minority voters to have "the same opportunity to participate in the political process as other citizens enjoy"; minority voters entitled to "an equal opportunity to participate in the politcal processes and to elect candidates of their choice"), 30 ("denial of equal access to any phase of the electoral process for minority voters"; standard is whether a challenged practice "operated to deny the minority plaintiff an equal opportunity to participate and elect candidates of their choice"; process must be "equally open to participation by the group in question"), 31 (remedy should assure "equal opportunity for minority citizens to participate and to elect candidates of their choice").

Additional Views, endorsed the committee report, and reiterated that under the language of section 2 minority voters were to be given "the same opportunity as others to participate in the political process and to elect the candidates of their choice".[55] Senator Dole and othe. repeatedly made this point on the floor of the Senate.[56]

The standard announced in White v. Regester was clearly one of equal opportunity, prohibiting at-large elections which afford minority voters "less opportunity than ... other residents in

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55 Id. at 194 (emphasis omitted); See also Id. at 193 ("Citizens of all races are entitled to have an equal chance of electing candidates of their choice...."), 194 ("equal access to the political process).

56 128 Cong. Rec. S6559 , S6560 (Sen. Kennedy)(daily ed. June 9, 1982); daily ed. June 17, 1982); 128 Cong. Rec. S7119-20 (Sen. Dole), (daily ed. June 18, 1982).

the district to participate in the political processes and to elect legislators of their choice." 412 U.S. at 765. (Emphasis added). The Solicitor General asserts that during the Senate hearings three supporters of section 2 described it as "merely a means of ensuring that minorities were not effectively 'shut out' of the electoral process". U.S. Br. II, 11. This is not an accurate description of the testimony cited by the Solicitor.[57]

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57 David Walbert stated that minority voters had had "no chance" to win elections in their earlier successful dilution cases, 1 Senate Hearings 626, but also noted that the standard under White was whether minority voters had an "equal opportunity" to do so. Id. Senator Kennedy stated that under section 2 minorities could not be "effectively shut out of a fair opportunity to participate in the election". Id. at 223. Clearly a "fair" opportunity is more than any minimal opportunity. Armand Derfner did use the words "shut out", but not, as the Solicitor does, followed by the clause "of the political process". Id. at 810. More importantly, both in his oral statement (id. at 796, , 800) and his prepared statement (id. at 811, 818) Mr. Derfner

Even if it were, the remarks of three witnesses would carry no weight where they conflict with the express language of the bill, the committee report, and the consistent statements of supporters. Ernst and Ernst v. Hochfelder, 425 U.S. 185, 204 n.24 (1976).

C. The Election of Some Minority Candidates Does Not Conclusively Establish The Existence Of Equal Political Opportunity

The central argument advanced by the Solicitor General and the appellants is that the election of a black candidate in a multi-member district conclusively establishes the absence of a section 2 violation. The Solicitor asserts, U S. Br. I 13-14, that it is not sufficient that there is underrepresentation now, or

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expressly endorsed the equal opportunity standard.

that there was underrepresentation for a century prior to the filing of the action; on the Solicitor's view there must at all times have been underrepresentation. Thus the Solicitor insists there is no vote dilution in Senate District 24, which has not elected a black since 1978, and that there can be no vote dilution in House District 36, because, of eight representatives, a single black, the first this century, was elected there in 1982 after this litigation was filed.

This interpretation of section 2 is plainly inconsistent with the language and legislative history of the statute. Section 2(b) directs the courts to consider "the totality of circumstances," an admonition which necessarily precludes giving conclusive weight to any single circumstance.[58] The "totality of circum-

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[58] The Solicitor's argument also flies in the

stances" standard was taken from White v. Regester, which Congress intended to codify in section 2. The House and Senate reports both emphasize the importance of considering the totality of circumstances, rather than focusing on only one or two portions of the record. Senate Report 27, 34-35; House Report, 30. The Senate Report sets out a number of "[t]ypical" factors to be considered in a dilution case,[59] of which "the extent to which members of the minority group have been

face of the language of section 2 which disavows any intent to establish proportional representation. On the Solicitor's view, even if there is in fact a denial of equal opportunity, blacks cannot prevail in a section 2 action if they have, or have ever had, proportional representation. Thus proportional representation, spurned by Congress as a measure of liability, would be resurrected by the Solicitor General as a type of affirmative defense.

[59] The factors are set out in the opinion below. JA 15.

elected to public office in the jurisdiction" is only one, and admonishes "there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other." Senate Report 28-29.[60] Senator Dole, in his additional views accompanying the committee report, makes this plain. "The extent to which members of a protected class have been elected under the challenged practice or structure is just one factor, among the totality of circumstances to be considered, and is not dispositive." Id. at 194. (Emphasis added).[61]

[60] See also Senate Report 23 ("not every one of the factors needs to be proved in order to obtain relief").

[61] 128 Cong. Rec. S6961 (daily ed. June 17, 1982) (Sen. Dole); 128 Cong. Rec. S7119 (daily ed. June 18, 1982) (Sen. Dole).

The arguments of appellants and the Solicitor General that any minority electoral success should foreclose a section 2 claim were expressly addressed and rejected by Congress. The Senate Report explains, "the election of a few minority candidates does not 'necessarily foreclose the possibility of dilution of the black vote.'" Id. at 29 n.115. Both White v. Regester and its progeny, as Congress well knew, had repeatedly disapproved the contention now advanced by appellants and the Solicitor.[62] In White itself, as the Senate Report noted, a total of two blacks and five hispanics had

62 "The results test, codified by the committee bill, is a well-established one, familiar to the courts. It has a reliable and reassuring track record, which completely belies claims that it would make proportional representation the standard for avoiding a violation." (Emphasis added). 128 Cong. Rec. S6559 (Sen. Kennedy) (daily ed. June 9, 1982).

been elected from the two multi-member districts invalidated in that case. Senate Report 22. Zimmer v. McKeithen, in a passage quoted by the Senate Report, had refused to treat "a minority candidate's success at the polls [a]s conclusive." Id. at 29 n.115. The decision in Zimmer is particularly important because in that case the court ruled for the plaintiffs despite the fact that blacks had won two-thirds of the seats in the most recent at-large election. 485 F.2d at 1314. The dissenters in Zimmer unsuccessfully made the same argument now advanced by appellants and the Solicitor, insisting "the election of three black candidates ... pretty well explodes any notion that black voting strength has been cancelled or minimized". 485 F.2d at 1310 (Coleman, J., dissenting). A number of other lower court cases implementing White had

also refused to attach conclusive weight to the election of one or more minority candidates.[63]

There are, as Congress anticipated, a variety of circumstances under which the election of one or more minority candidates might occur despite an absence of

63 Kirksey v. Board of Supervisors, 554 F.2d 139, 149 n.21 (5th Cir. 1977); Cross v. Baxter, 604 F.2d 875, 880 n.7, 885 (5th Cir. 1979); United States v. Board of Supervisors of Forrest County, 571 F.2d 951, 956 (5th Cir. 1978); Wallace v. House, 515 F.2d 619, 623 n.2 (5th Cir. 1975). See also Senator Hollings' comments on the district court decision in McCain v. Lybrand, No. 74-281 (D.S.C. April 17, 1980), finding a voting rights violation despite some black participation on the school board and other bodies. 128 Cong. Rec. S6865-66 (daily ed. June 16, 1975). In post-1982 section 2 cases, the courts have also rejected the contention that the statute only applies where minorities are completely shut out. See e.g., United States v. Marengo County Commission, 731 F.2d 1546, 1571-72 (11th Cir. 1984), cert. denied, 105 S.Ct. 375 (1984); Velasquez v. City of Abilene, 725 F.2d 1017, 1023 (5th Cir. 1984); Major v. Treen, 574 F. Supp. 325 (E.D. La. 1983) (three-judge court).

the equal electoral opportunity required by the statute. A minority candidate might simply be unopposed in a primary or general election, or be seeking election in a race in which there were fewer white candidates than there were positions to be filled.[64] White officials or political

64 The Solicitor General suggests that the very fact that a black candidate is unopposed conclusively demonstrates that the candidate or his or her supporters were simply unbeatable. U.S. Br. II, 22 n.46, 33. But the number of white potential candidates who choose to enter a particular at-large race may well be the result of personal or political considerations entirely unrelated to the circumstances of any minority candidate. Evidence that white potential candidates were deterred by the perceived strength of a minority candidate might be relevant rebuttal evidence in a section 2 action, but here appellants offered no such evidence to explain the absence of a sufficient number of white candidates to contest all the at-large seats. Moreover, in other cases, the Department of Justice has urged courts to find a violationof section 2 notwithstanding the election of a black candidate running unopposed. See United States v. Marengo County Commission (S.D. Ala.) No. 78-474H, Proposed Findings of Fact and Conclusions of Law for the United States,

leaders, concerned about a pending or threatened section 2 action, might engineer the election of one or more minority candidates for the purpose of preventing the imposition of single member districts.[65] The mere fact that minority candidates were elected would not mean that those successful candidates were the representatives preferred by minority

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filed June 21, 1985, p. 8.

65 Zimmer v. McKeithen, 485 F.2d at 1307:

> "Such success might, on occasion, be attributable to the work of politicians, who, apprehending that the support of a black candidate would be politically expedient, campaign to insure his election. Or such success might be attributable to political support motivated by different considerations--namely that election of a black candidate will thwart successful challenges to electoral schemes on dilution grounds. In either situation, a candidate could be elected despite the relative political backwardness of black residents in the electoral district."

voters. The successful minority candidates might have been the choice, as in White v. Regester, 412 U.S. at 755; Senate Report, 22, of a white political organization, or might have been able to win and retain office only by siding with the white community on, or avoiding entirely, those issues about which whites and non-whites disagreed. Even where minority voters and candidates face severe inequality in opportunity, there will occasionally be minority candidates able to overcome those obstacles because of exceptional ability or "a 'stroke of luck' which is not likely to be repeated...."[66]

The election of a black candidate may also be the result of "single shooting", which deprives minority voters of any vote at all in every at-large election but one.

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66 Wallace v. House, 515 F.2d 619, 623 n.2 (5th Cir. 1975).

In multi-member elections for the North Carolina General Assembly where there are no numbered seats, voters may typically vote for as many candidates as there are vacancies. Votes which they cast for their second or third favorite candidates, however, may result in the victory of that candidate over the voters' first choice.[67] Where voting is along racial lines, the only way minority voters may have to give preferred candidates a serious chance of victory is to cast only one of their ballots, or "single shoot," and relinquish any opportunity at all to influence the

67 This is especially true in North Carolina where, because of the multiseat electoral system, a candidate may need votes from more than 50% of the voters to win. For example, in the Forsyth Senate primary in 1980, there were 3 candidates for 2 seats. If the votes were spread evenly and all voters voted a full slate, each candidate would get votes from 2/3 or 67% of the voters. In such circumstances it would take votes from more than 67% of the voters to win. N.C.G.S. 163.111(a)(2).

election of the other at-large officials.[68]

Where single shot voting is necessary to elect a black candidate, black voters are forced to limit their franchise in order to compete at all in the political process. This is the functional equivalent of a rule which permitted white voters to cast five ballots for five at-large seats, but required black voters to abnegate four of those ballots in order to cast one ballot for a black candidate.

68 For example, in 1978, in Durham County, 99% of the black voters voted for no one but the black candidate, who won. JA Ex. Vol. I Ex. 8. In Wake County in 1978, approximately 80% of the black voters supported the black candidate, but because not enough of them single shot voted the black candidate lost. The next year, after substantially more black voters concentrated their votes on the black candidate, forfeiting their right to vote a full slate, the first black was elected. Similarly in Forsyth County when black voters voted a full slate in 1980, the black candidate lost. It was only after many black voters declined to vote for any white candidates that black candidates were elected in 1982. Id.

Black voters may have had some opportunity to elect one representative of their choice, but they had no opportunity whatever to elect or influence the election of any of the other representatives.[69] Even where the election of one or more blacks suggests the possible existence of some electoral opportunities for minorities, the issue of whether those opportunities are the same as the oppor-

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69 There is no support for appellants' claim that white candidates need black support to win at-large. Black votes were not important for successful white candidates. Because of the necessity of single shot voting, in most instances black voters were unable to affect the outcome of other than the races of the few blacks who won. For example, white candidates in Durham were successful with only 5% of the votes cast by blacks in 1978 and 1982; in Forsyth, white candidates in 1980 who received less than 2% of the black vote were successful, and in Mecklenburg in 1982, the leading white senate candidate won the general election although only 5% of black voters voted for him. Id. See, JA 244.

tunities afforded to whites can only be resolved by a distinctly local appraisal of all other relevant evidence.

These complex possibilities make clear the wisdom of Congress in requiring that a court hearing a section 2 claim must consider "the totality of circumstances," rather than only considering the extent to which minority voters have, or have not, been underrepresented in one or more years. Congress neither deemed conclusive the election of minority candidates, nor directed that such victories be ignored.[70] The language and legislative history of section 2 recognize the potential significance of the election

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70 As in other areas of civil rights, the results test in section 2 no more requires proof that no blacks ever win elections than the effect rule in Title VII requires that no blacks can ever pass a particular non-job related test. See Connecticut v. Teal, 457 U.S. 440 (1982).

of minority candidates, but require that the significance of any such elections be carefully assessed from a local vantage in order to determine what light, if any, those events shed, in the context of all relevant circumstances, on the section 2 claim at issue.

II. THE DISTRICT COURT REQUIRED NEITHER PROPORTIONAL REPRESENTATION NOR GUARANTEED MINORITY POLITICAL SUCCESS

Appellants flatly assert that the district court in this case interpreted section 2 to "creat[e] an affirmative entitlement to proportional representation". A. Br. 19. The district court opinion, however, simply contains no such construction of section 2. On the contrary, the lower court expressly held that section 2 did not require proportional representation, emphasizing that "the fact that blacks have not been

elected under a challenged districting plan in numbers proportional to their percentage of the population" "does not alone establish that vote dilution has resulted." JA 17.

Appellants suggest in the alternative that the district court "apparently" equated the equal opportunity required by section 2 with "guaranteed electoral success," A. Br. 14, 15, 35. Again, however, no such rule of law is espoused in any portion of the opinion below. The ultimate factual findings of the district court are not cast in terms of the lack of any such guarantee; rather the trial court concluded that section 2 had been violated because minority voters had "less opportunity than do other members of the electorate to participate in the political process and to elect representatives of their choice." JA 54.

The Solicitor argues that, because the facts as he personally views them did not violate section 2, the three trial judges must have been applying an incorrect, albeit unspoken, interpretation of section 2. Thus the Solicitor asserts that since the trial court

> could not reasonably have found a violation under the proper ... standard, [it] rather must implicitly have sought to guarantee continued minority electoral success. (U.S. Br. II, 7) (Emphasis added).[71]

But the district court, whether or not the Solicitor thinks it reasonable, found as a matter of fact that blacks do not enjoy the same opportunity as whites to participate in the political process. The

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71 See also U.S. Br. I, 12 (in light of Solicitor's view of the facts, misinterpretation of the law is "the only explanation for the district court's conclusion", 18 n.19 (district court "in effect" interpreted section 2 as imposing a "proportional representation plus" standard).

Solicitor's argument is simply an attempt to transform a disagreement about the relevant facts, a disagreement in which the trial court's findings would be subject to Rule 52, into an issue of law. If the trial court's factual findings are clearly erroneous they can, of course, be reversed on appeal. But if both those factual findings and the legal principles announced by the district court are sound, the resulting judgment cannot be overturned by hypothesizing that the three trial judges here were purposefully applying legal principles different than those actually set forth in their opinion.

Although the trial court expressly construed section 2 not to require proportional representation, appellants suggest, A. Br. 19-20, that the lower court implicitly announced that it was

applying just such a requirement in the following passage:

> The essence of racial vote dilution in the White v. Regester sense is this: that primarily because of the interaction of substantial and persistent racial polarization in voting patterns (racial bloc voting) with a challenged electoral mechanism, a racial minority with distinctive group interests that are capable of aid or amelioration by government is effectively denied the political power to further those interests that numbers alone would presumptively, see United Jewish Organizations v. Carey, 403 U.S. 144, 166 n.24 (1977), give it in a voting constituency not racially polarized in its voting behavior. See Nevett v. Sides, 571 F.2d 209, 223 & n.16 (5th Cir. 1978). JA 16.

This passage, which is immediately preceded by discussion of the totality of circumstances test, and followed by an exposition of the statutory disclaimer prohibiting proportional representation, asserts only that, in the absence of vote dilution, black voters would possess the

ability to influence the policies of their elected officials, not, as appellants claim, that black voters would be certain to elect black officials "in proportion to their presence in the population". A. Br. 20. The portion of Nevett v. Sides referred to by the district court discusses the extent to which black voters, in the absence of polarized voting, would have the political power to assure that their interests were protected by white officials.[72]

Appellees in this case did not seek, and the trial court did not require,[73] any

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72 Nevett v. Sides, 571 F.2d at 223 n.16.

73 Indeed appellants proposed the plan now in effect for all the districts at issue, which was adopted by the court without modification. See supra, at 5-6.

guarantee of proportional representation, and proportional representation did not result from the decision below.[74]

III. THE DISTRICT COURT APPLIED THE CORRECT STANDARDS IN EVALUATING THE EVIDENCE OF POLARIZED VOTING

In determining whether a method of election violates section 2, a trial court must evaluate "the extent to which voting in the elections of the state or political subdivision is racially polarized." S. Rep. at 29.[75] The court below evaluated the

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74 Prior to this litigation only 4 of the 170 members of the North Carolina legislature were black; today there are still only 16 black members, less than 10%, a far smaller proportion than the 22.4% of the population who are black. Whites, who are 75.8% of the state population, still hold more than 90% of the seats in the legislature.

75 Racial bloc voting is significant in a section 2 case because, in the context of an electoral structure wherein the number of votes needed for election exceeds the number of black voters, it substantially diminishes the opportunity for black voters to elect candidates of their

lay and expert testimony on this question and found "that within all the challenged districts racially polarized voting exists in a persistent and severe degree." JA 40. Appellants argue that this finding is erroneous as a matter of law.

Appellants, A. Br. 36, and the Solicitor, U.S. Br. II 39, contend that the court erroneously defined racially polarized voting as occurring "whenever less than a majority of white voters vote for the black candidate." But the district court, guided by the Senate report and in accordance with the experts for appellants and appellees, in fact defined racially polarized voting as the

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choice, and it allows white candidates to ignore the interests of the black community and still get elected. See United States v. Carolene Products Co., 304 U.S. 144, 152-3 n.4 (1938); Major v. Treen, 574 F. Supp. 325, 339 (E. D. La. 1983) (three judge court).

extent to which black and white voters vote differently from each other in relation to the race of the candidates.[76]

The court focused not only on the existence but the degree of polarized voting. As articulated by the court, the relevant question is whether a substantial enough number of white citizens do not vote for black candidates, so that the polarization operates, under the election method in question, to diminish the opportunity of black citizens to elect candidates of their choice. JA 16-17, 43.

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76 Senate Report, 29; JA 40, n.29; JA 123. T. 1404. See also City of Rome v. United States, 446 U.S. 156, 183-187 (1980), affirming 472 F. Supp. 221, 226 (D.D.C. 1979) ("Racial bloc voting is a situation where, when candidates of different races are running for the same office, the voters will by and large vote for the candidate of their own race.)" Accord, 128 Cong. Rec. S7120 (Sen. Dole)(daily ed. June 18, 1982).

This inquiry is plainly consistent with the statutory language of Section 2.

A. Summary of the District Court's Findings

The District Court examined a number of factors in determining that voting was severely racially polarized.

1. The court examined the percentage[77] of white and black voters who voted for the black candidates in each of 53 primaries and general elections in which a black candidate had run during the three election years prior to the trial. JA 43-48. The court found that, on the average, 81.7% of white voters did not

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77 Appellants conceded that the method used to assess the extent of racially polarized voting is standard in the literature and that the statistical analysis performed by appellees' expert was done accurately, JA 131-2, 281.

vote for any black candidate in the primary elections, and "approximately two thirds of white voters did not vote for black candidates in general elections even after the candidate had won the Democratic primary and the only choice was to vote for a Republican or no one." JA 42.

2. The district court determined how often the candidates of choice of white voters and of black voters were different. Although, in primaries, black voters ranked black candidates first or first and second, white voters almost always ranked them last or next to the last. JA Ex. Vol. I Ex. 5-7. In general elections, white voters almost always ranked black candidates either last or next to last in the multi-candidate field except in heavily Democratic areas; in those latter, "white voters consistently ranked black

candidates last among Democrats if not last or next to last among all candidates." JA 42. If white voters as a group are selecting different candidates than black voters as a group, assuming black voters are in a minority, the polarization diminishes the chances that the black voters' candidate will be elected. JA 132-136. In fact, the court found that in all but two of the election contests, the black candidates who were the choice of black voters were ranked last or near last such that they lost among white voters. JA 42, n.31.[78]

3. The court considered statistical analyses of the degree of correlation between the race of voters and the race of candidates whom they supported. The race of the voter and the race of a candidate

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[78] In describing this analysis the court used the term "substantively significant". JA 41-2.

were very closely correlated.[79] The court found that the probability of such correlations appearing by chance was less than 1 in 100,000. JA 41 and n.30. Appellants' expert agreed with this determination. JA 281.

B. The Extent of Racial Polarization was Significant, Even Where Some Blacks Won

In addition to their mischaracterization of the court's analysis, appellants propose a novel standard for assessing the degree of polarized voting. Appellants contend that racial polarization of voting has no legal significance unless it

79 Expert witnesses for appellants and appellees agreed that the correlation coefficient is the standard measure of whether black and white voters vote differently from each other. JA 129, 281. Correlations above an absolute value of .5 are relatively rare. The correlations in this case had absolute values between .7 and .98, with most above .9. JA 41, n.30.

always causes blacks to lose.[80] A. Br. 35, 40. Under appellants' standard, a theory not adopted in any vote dilution case they cite, any minority electoral success precludes a finding of racially polarized voting and bars a section 2 violation, a result clearly contrary to the intent of Congress. See S. Rep. at 29, n.115 and pp. 50-64, supra. Appellees know of no

80 The Solicitor General does not adopt appellants' proposed standard, but articulates the inquiry as whether "the impact of racial bloc voting in combination with the challenged procedure --here, multimember districts -- deprives black voters of equal access to the electoral process..." U.S. Br. 31-32. Assuming that the Solicitor General includes with "equal access to the electoral process", as the statutory language of section 2 does, an equal opportunity to elect candidates of black voters' choice, the Solicitor General does not disagree with the district court's conception of the question. The Solicitor General simply disagrees with the district court's finding of fact as to its answer.

court which has adopted appellants' proposed standard in a section 2 case.

Other courts have found polarized voting sufficient to support a violation of section 2, despite a finding of some electoral success. In McMillan v. Escambia County, 748 F.2d 1037, 1043, 1045 (11th Cir. 1984) (McMillan II), the court found racially polarized voting and a violation of section 2 despite some black electoral success, based on a finding that "a consistent majority of the whites who vote will consistently vote for the black's opponent." See also Major v. Treen, 574 F. Supp. at 339.

In fact, in 65% of the election contests analyzed here in which the black candidate received substantial black support, the black candidate did lose because of racial polarization in voting.

That is, he lost, even though he was the top choice of black voters, because of the paucity of support among white voters. Appellants' statement that "two thirds of all black candidates have been successful", A. Br. 45, is misleading since it only counts black candidates who made it to the general elections and ignores the many black candidates who lost in the Democratic primaries. Furthermore, of white Democrats who made it to the general election, 100% were successful in 1982, and about 90% were successful in earlier election years. JA Ex. Vol. I Ex. 13.

Appellants rely on Rogers v. Lodge, 458 U.S. 613 (1982) and two post-Mobile lower court cases, all involving claims of discriminatory intent under the Fourteenth Amendment. We do not read the cited cases to hold that racial polarization is legally significant only if it uniformly

causes electoral defeat.[81] But this Court need not consider, in the context of this case, whether appellants' bold assertion is correct. Assuming arguendo that proof of absolute exclusion may be necessary to raise an inference of discriminatory intent, it is not necessary to show that black citizens have "less opportunity" than do whites to elect candidates of their choice in violation of the results standard of section 2.

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81 The lower court in Rogers v. Lodge found racial bloc voting based upon an analysis that included an election in which a black had won a city council seat. Lodge v. Buxton, Civ. No. 176-55 (S.D. Ga. Oct. 26,1978) slip. op. at 7-8. In NAACP v. Gadsden County School Board, 691 F.2d 978 (11th Cir. 1982), the finding of unconstitutional vote dilution was upheld despite the election of one black candidate to the school board, a level of electoral success similar to that present here in House District 21 and House District 36.

C. Appellees Were not Required to Prove that White Voters' Failure to Vote for Black Candidates was Racially Motivated.

Appellants contend that proof that white voters rarely or never vote for minority candidates does not establish the presence of polarized voting. Rather, they urge, a plaintiff must adduce probative evidence of the motives of the individual white voters at issue, and must establish that those voters cast their ballots with a conscious intention to discriminate against minority candidates because of the race of those candidates.[82] A. Br. 42-44.

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82 Appellants argue in particular that proof of motives of the electorate must take the form of a multivariate analysis. (App.Br. 43-44). No such multivariate analysis was presented in White v. Regester or any of the other dilution cases to which Congress referred in adopting section 2. Although appellants now urge that evidence of a multivariate analysis is essential as a matter of law, no such contention was ever made to the district court.

This proposed definition of polarized voting would incorporate into a dilution claim precisely the intent requirement which Congress overwhelmingly voted to remove from section 2. The legislative history of section 2 is replete with unqualified statements that no proof of discriminatory intent would be required in a section 2 case, and Congress' reasons for objecting to the intent requirement in Bolden are equally applicable to the intent requirement now proposed by appellants.[83]

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83 The reasons set out in the Senate Report for rejecting any intent requirement were reiterated by individual members of Congress. Senate Report 193 (additional views of Sen. Dole); 128 Cong. Rec. (daily ed. June 9, 1982) S6560-61 (Sen. Kennedy); 128 Cong. Rec. (daily ed. June 15, 1982) S6779 (Sen. Specter); 128 Cong. Rec. (daily ed. June 17, 1982) S6931 (Sen. DeConcini); S6943 (Sen. Mathias); S6959 (Sen. Mathias); 128 Cong. Rec. (daily ed. June 18, 1982) S7109 (Sen. Tsongas); S7112 (Sen. Riegle); S7138 (Sen. Robert Byrd).

Congress opposed any intent requirement, first, because it believed that the very litigation of such issues would inevitably stir up racial animosities, insisting that inquiries into racial motives "can only be divisive." Senate Report 36. Congress contemplated that under the section 2 results test the courts would not be required to "brand individuals as racist." Id. The divisive effect of litigation would be infinitely greater if a plaintiff were required to prove and a federal court were to hold that the entire white citizenry of a community had acted with racial motives.

Second, Congress rejected the intent test because it created "an inordinately difficult burden for plaintiffs in most cases." (S.Rep. 36) The Senate Committee expressed particular doubts about whether

it might be legally impossible to inquire into the motives of individual voters, id., and referred to a then recent Fifth Circuit decision holding that the First Amendment forbade any judicial inquiry into why a specific voter had voted in a particular way.[84] Congress thought it unreasonable to require plaintiffs to establish the motives of local officials; establishing the motives of thousands of white voters, none of whom keep any records of why they voted, and all of whom are constitutionally immune from any inquiry into their actions or motivations in casting their ballots,[85] would clearly

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84 Id. 36 n.135, citing Kirksey v. City of Jackson, 699 F.2d 317 (5th Cir. 1982), clarifying Kirksey v. City of Jackson, 663 F.2d 659 (5th Cir. 1981).

85 See also Anderson v. Mills, 664 F.2d 600, 608-9 (6th Cir. 1981); South Alameda Spanish Speaking Org. v. City of Union City, 424 F.2d 291, 295 (9th Cir. 1970); United States v. Executive Committee of Democratic Party of Greene County, Ala., 254 F. Supp. 543, 546 (S.D. Ala. 1966).

be an infinitely more difficult task.[86]

Counsel for appellants contend that the plaintiffs in a section 2 action should be required to establish the motives of white voters by means of statistics, but at trial appellants' statistician conceded it would be impossible to do so.[87]

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86 The courts have consistently entered findings of racially polarized voting without imposing the additional burdens now urged by appellants. See Mississippi Republican Executive Committee v. Brooks, ___ U.S. ___, 105 S.Ct. 416 (1984) (summary affirmance of district court using correlation test). See also Rogers v. Lodge, supra, 458 U.S. at 623; Marengo County, supra, 731 F.2d at 1567 n.34; Perkins v. City of West Helena, 675 F.2d 201, 213 (8th Cir. 1982), aff'd mem. 459 U.S. 801 (1982); City of Port Arthur v. United States, 517 F. Supp. 987, 1007 n.136 (D.D.C. 1981), aff'd 459 U.S. 159 (1982).

87 Appellants' expert testified that many of the variables which he considers important, such as a candidate's skills or positions on the issues, are not quantifiable. He did not suggest how such an analysis could be performed, and he

Third, Congress regarded the presence or absence of a discriminatory motive as largely irrelevant to the problem with which section 2 was concerned. Senate Report 36. The motives of white voters are equally beside the point. The central issue in a dilution case is whether, not why, minority voters lack an equal opportunity to elect candidates of their choice.

In appellant's view, polarized voting occurs only when whites vote against black candidates because of their race, but not when whites consistently vote against black candidates because those candidates

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conceded he had never performed one. T. 1420, 1460, JA 283. Even McCleskey v. Zant, 580 F.Supp. 338 (N.D.Ga. 1984), aff'd, 753 F.2d 877 (5th Cir. 1985), cert. pending, No. 84-____, on which appellants rely, holds that such regression analyses are incapable of demonstrating racial intent where, as here, "qualitative" nonquantifiable differences are involved. 580 F. Supp. at 372.

are not able to purchase expensive media campaigns or obtain endorsements from local newspapers. The reasons appellants present as a legitimate basis for whites not voting for black candidates are almost invariably race related. In the instant case, for example, the inability of black candidates to raise large campaign contributions had its roots in the discrimination that has impoverished most of the black community. An election system in which black candidates cannot win because their supporters are poor, or because local newspapers only endorse whites, or because of white hostility to any candidate favoring enforcement of civil rights laws, is not a system in which blacks enjoy an equal opportunity to participate in the political process or elect candidates of their choice.[88]

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[88] Moreover, to require a district court to

D. The District Court's Finding of the Extent of Racially Polarized Voting is not Clearly Erroneous.

Based on the analysis summarized in Part III A, supra, the trial judges found "that in each of the challenged districts racial polarization in voting exists to a substantial or severe degree, and that in each district it presently operates to minimize the voting strength of black voters." JA 48.

The Solicitor contends that the district court ignored possible variations in the extent of polarized voting, asserting

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determine which ostensible reasons are legitimate and which are race related would be exactly the type of subjective, motivational analysis Congress sought to avoid. If such an analysis were relevant, even the Solicitor General agrees that it is not necessary in order to establish a prima facie case, but it is the defendants' burden to prove it on rebuttal. U.S. Br. 30, n.57. Accord, Jones v. Lubbock, 730 F.2d 233, 236 (5th Cir. 1984)(Higginbotham concurring). No such evidence was offered here.

> the district court adopted a definition of racial bloc voting under which racial polarization is "substantively significant" or "severe" whenever "the results of the individual election would have been different depending upon whether it had been held among only the white voters or only the black voters in the election. U.S. Br. I, 29.

The Solicitor argues that under this definition elections in which only 49% of whites voted for a black would be held to be "severely racially polarized". U.S. Br. 29. (Emphasis in original). This argument rests on a misrepresentation of the language of the opinion below. The quoted reference to differences in the preferences of black and white voters appears on page JA 41 of the opinion, where the district court correctly notes the presence of such differences in this case. The term "severe" does not appear in that passage at all, but is used on the

next page in a separate paragraph to describe elections in which 81.7% of white voters declined to vote for any black candidate. JA 42. The opinion of the district court clearly distinguishes the presence of any differences between black and white voters from a case in which whites overwhelmingly opposed the candidate preferred by black voters, and equally clearly characterizes only the latter as "severe."

The primary evidentiary issue regarding polarized voting that must be resolved in a section 2 dilution case is whether the degree of polarization was sufficiently severe as to materially impair the ability of minority voters to elect candidates of their choice.[89] In

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89 While appellants do not challenge the method appellees' expert used to analyze the election returns in general, JA 131-2, 281, appellants claim that appellees' regression analysis is flawed by what they labeled the "ecological fallacy." They assert that instead of using turnout figures, appellees' expert used voter registration figures. A. Br. 41. Not only was this argument made to the district court and rejected, JA 40, n.29, but also it is not accurate. Appellees' expert, Dr. Grofman, did have turnout figures for each precinct, and he used a regression analysis to calculate the turnout figures by race. Px 12 at pp. 3-8. In fact, appellants' expert admitted that he did not know what method Dr. Grofman used to calculate turnout, JA 279-80, and he, therefore, could not express an opinion about the accuracy of the method.

concluding that such impairment had been shown, the court relied on the extensive fact findings noted above, including the fact on average 81.7% of white voters do not vote for any black candidate in a primary election. The polarization was most severe in House District 8, where an average of 92.7% of white voters do not vote for any black candidate in a primary, JA 47-48; the district court correctly

noted that in that district it was mathematically impossible for a black candidate ever to be elected. JA 48.

In the other districts, the degree of polarization was sufficiently severe to be a substantial impediment, although not necessarily an absolute bar, to the election of minority candidates. The average portion of white voters willing to support a black candidate in a primary was 18%. The proportion of voters that was white ranged from 70.5% to 84.9%. JA 21. In each of the disputed districts the number of white voters who in primaries do not support the black candidate favored by the black community constituted a majority of the entire electorate.[90] Under those

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90 Given the small percentage of black voters, the failure of this number of whites to vote for black candidates presented a substantial barrier. The lower the black population of the district, the more white voters it takes voting for the black candidate to make it possible for him to win. Moreover, no evidence was presented to show that the extent of racial polarization was declining. JA 137, 140.

Here, while there are a large number of black citizens, because they are submerged into such large multimember districts, they are a small percentage of the total electorate. For example, in House District 36 (Mecklenburg County), there are 107,006 black residents, Px 4(b), JA Ex. Vol. II, more than enough for two whole House Districts, id., but because they are submerged into an eight member district, they are only 26.5% of the population. Because the percentage of the registered voters in each of the districts which is black is relatively low, ranging from 15% to 29%, it takes little polarization to impede materially the ability of the black community to elect candidates of its choice.

circumstances, the election of candidates preferred by black voters, while not mathematically impossible, is obviously extremely difficult.

Appellants attack the lower court's finding of substantial polarized voting by selectively citing the record. Of the 53 elections discussed by the trial court,

appellants refer only to 8. A. Br. 36-38. In most instances, appellants emphasize the election at which white support for a black candidate was the highest of any election in that district.[91] The highest proportion of white support for minority candidates cited by appellants were in the 1982 Durham County general elections and the 1982 Mecklenburg County primary. (A. Br. 36-37), but there were no Republican candidates in the 1982 general election in Durham County, and in the 1982 Mecklenburg County primary there were only seven white candidates for eight positions in the primary. JA 46, 44. Thus the white votes of 47% and 50% in those two races represent the number of whites willing to vote for an unopposed black instead of not voting at all, rather than the proportion

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91 This is true of examples (a)(b)(h)(i) and (j) in Appellants' Brief. See JA 152.

of whites willing to support in a contested election a minority candidate favored by the minority community.

IV. THE DISTRICT COURT FINDING OF UNEQUAL ELECTORAL OPPORTUNITY WAS NOT CLEARLY ERRONEOUS

A. The Clearly Erroneous Rule Applies

Appellants contend that, even if the district court was applying the correct legal standard, the court's subsidiary factual findings, as well as its ultimate finding that minority voters do not enjoy an equal opportunity to elect candidates of their choice in the disputed districts, were mistaken. Appellants correctly describe these contentions as presenting a "factual question."[92] The lower courts

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92 A. Br. 25; see also id. at 35 ("no matter how one weights and weighs the evidence presented, it does not add up to a denial of equal access"), 26 (disputed trial court findings made "in spite of the facts"), 29 ("[n]othing in the record ... supports" a disputed finding), 30 n.12

have consistently held that a finding under section 2 of unequal political opportunity is a factual finding subject to the Rule 52 "clearly erroneous" rule.[93] The courts of appeal considering constitutional vote dilution claims prior to Bolden also applied the clearly erroneous rule to findings of the trial court.[94]

(testimony relied on by the trial court "was simply not credible"), 30 (plaintiffs "failed to prove" a subsidiary fact).

93 Collins v. City of Norfolk, 768 F.2d 572, 573 (4th Cir., July 22, 1985) (slip opinion, p. 4); McCarty v. Henson, 749 F.2d 1134, 1135 (5th Cir. 1984); Jones v. City of Lubbock, 727 F.2d 364, 371, 380 (5th Cir. 1984); Velasquez v. City of Abilene, 725 F.2d 1017, 1021 (5th Cir. 1984); United States v. Marengo County Com'n, 731 F.2d 1546, 1552 (11th Cir. 1984); Buchanan v. City of Jackson, 708 F.2d 1066, 1070 (6th Cir. 1983).

94 Parnell v. Rapidas Parish School Bd., 563 F.2d 180, 184-5 (5th Cir. 1977); Hendrix v. Joseph, 559 F.2d 1265, 1268 (5th Cir. 1977); McGill v. Gadsden County Comission, 535 F.2d 277, 280 (5th Cir. 1976); Gilbert v. Sterrett, 508 F.2d 1389., 1393 (5th Cir. 1975); Zimmer v. McKeithen, 485 F.2d at 1302 n.8 (majority opinion), 1309-10 (Coleman, J., dissenting), 1314 (Clark,

Until recently the United States also maintained, that absent any failure to apprehend and apply the correct legal standards, a finding of unequal electoral opportunity under section 2 was a factual finding subject to Rule 52(a), F.R. Civ. P.[95]

The Solicitor General now asserts, however, that Rule 52 does not apply to a finding of vote dilution under section 2. The Solicitor acknowledges that the determination of a section 2 claim "requires a careful analysis of the challenged electoral process, as informed by its actual operation." U.S. Br. II, 18. But, he urges that the ultimate finding of the trial court based on that

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J., dissenting).

95 See Brief for the United States, United States v. Dallas County Commission, 11th Cir, (No. 82-7362) (dated March 27, 1983) p. 26.

analysis may be reversed whenever an appellate court views the facts differently.

The arguments advanced by the Solicitor do not justify any such departure from the principles of Anderson v. City of Bessemer City, 84 L.Ed.2d 518 (1985). A number of the cases relied on by the Solicitor General involved simple matters of statutory construction,[96] or the meaning of a constitutional right where the facts were not in dispute.[97]

In Bose Corp. v. Consumers Union, 80 L.Ed.2d 502 (1984) this Court declined to apply Rule 52, but it did so only because the Constitution requires appellate courts in First Amendment cases to undertake "an

96 Metropolitan Edison Co. v. PANE, 460 U.S. 766 (1983); Harper &. Row, Publisher v. Nation, 85 L.Ed.2d 588, 600-02 (1985).

97 Strickland v. Washington, 80 L.Ed.2d 674 (1984).

independent examination of the whole record." 80 L.Ed.2d at 515-26. The Solicitor suggests that the special standard of appellate review in Bose should be extended to any statutory claim in which "the stakes ... are too great to entrust them finally to the judgment of the trier of fact." U.S. Br. II 19. But this Court has already applied Rule 52 to Fourteenth Amendment claims of purposeful discrimination in voting,[98] to claims of discriminatory effect under section 5 of the Voting Rights Act,[99] and to claims arising under Title VII of the 1964 Civil Rights Act.[100] The "stakes" in each of these areas of the law are surely as great as

98 Hunter v. Underwood, 85 L.Ed.2d 222, 229 (1985); Rogers v. Lodge, supra, at 622-23.

99 City of Rome v. United States, 446 U.S. 156, 183 (1980).

100 Anderson v. City of Bessemer City, supra;

under Section 2. Cf. Alyeska Pipeline Service v. Wilderness Society, 421 U.S. 240, 263-64 (1975). As this Court emphasized in White v. Regester, a district court called upon to resolve a vote dilution claim occupies "its own special vantage point" from which to make an "intensely local appraisal" of the existence of racial vote dilution.[101] 412

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101 The application of Rule 52 is particularly appropriate in a case such as this where the appellants' brief is replete with controverted or clearly inaccurate factual assertions. For example, appellants state without citation, "In Halifax, several blacks have been elected to the County Commission and the City Council of Roanoke Rapids." A. Br. 11. This is false. No black had ever been elected to either body. JA 233. Appellants state, "The Chair of the Mecklenburg County Democratic Executive Committee at the time of trial and his immediate predecessor are also black. Stip. 126 " A. Br. 8. Stipulation 126 actually says, "The immediate Past Chairman of the Mecklenberg County Democratic Executive Committee, for the term from 1981 through May 1983, was Robert Davis, who is black. Davis is the only black person ever to hold that position." JA 105. Appellants state that "If Forsyth County were divided into

U.S. at 769.

From "its own special vantage point" the court here made detailed and extensive fact findings on virtually all the factors the Senate Report thought probative of a section 2 violation. The findings of the district court involved six distinct multi-member districts, the circumstances of which were of course not precisely identical. Appellants neither contend that these differences are of any importance or suggest that the trial court's ultimate finding of unequal electoral opportunity under the totality of circumstances is any

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single member House districts, one district with a population over 65% black could be formed. Stip. 129." App. Br. 9. Stipulation 129 in fact says that two majority black districts could be formed. JA 105. The omission is particularly deceptive since the remedy proposed by appellants, which was accepted unchanged by the district court, contained two districts in Forsyth County which are majority black in voter registration.

less justifiable in any one district than in the others. Rather, appellants advance objections which they contend are equally applicable to all the districts at issue. Appellants attack the district court's ultimate finding by generally challenging each of the subsidiary findings on which it is based. A. Br. 25-34.

B. Evidence of Prior Voting Discrimination

The district court, after describing the long North Carolina history of official discrimination intended to prevent blacks from registering to vote, as well as some relatively recent efforts to counteract the continuing effects of that discrimination, concluded:

> The present condition .... is that, on a state wide basis, black voter registration remains depressed relative to that of the white majority, in part at least because of the long period

> of official state denial and chilling of black citizens' registration efforts. This statewide depression of black voter registration levels is generally replicated in the areas of the challenged districts, and in each is traceable in part at least to the historical statewide pattern of official discrimination here found to have existed. JA 27-28.

Such disparities in black and white registration, rooted in past and present discrimination, is one of the factors which Congress recognized puts minority votes at a comparative disadvantage in predominantly white multi-member districts. Senate Report 28.

Appellants concede, as they must, that it was for decades the avowed policy of the state to prevent blacks from registering to vote. A. Br. 25. The district court noted, for example, that in 1900 the state adopted a literacy test for the avowed purpose of disfranchising black

voters, and that that test remained in use at least until 1970. JA 25. Appellants argue, as they did at trial, that all effects of these admitted discriminatory registration practices were entirely eliminated because recent state efforts to eliminate those effects "have been so successful." A. Br. 27. The district court, however, concluded that recent registration efforts had not been sufficient to remove "the disparity in registration which survives as a legacy of the long period of direct denial and chilling by the state of registration by black citizens" JA 27.

The district court's finding is amply supported by the record below. In every county involved in this litigation the white registration rate exceeds that of blacks, and in many of those counties the differential is far greater than the

statewide disparity.[102] Id. at n.22. Even appellants' witnesses acknowledged that this disparity was unacceptably great. Px 40; T.575-77, 1357; JA 199. There was direct testimony that the history of mistreatment of blacks continued to deter blacks from seeking to register. JA 175, 188-89, 211-12, 220-25, 229, 242-43.

Appellants contend that in the last few years the state board of elections has taken steps to register blacks who might have been rejected or deterred by past practices. A. Br. 26. But the state's involvement did not begin until 1981, and the record was replete with evidence that, long after the literacy test ceased to be

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102 In 1971, the year after use of the discriminatory literacy test ended, 60.6% of whites were registered, compared to 44.4% of qualified blacks. As of 1982 that registration gap had only been slightly narrowed, with 66.7% of whites and 52.7% of blacks registered. JA 26.

used, local white election officials at the county level pursued practices which severely limited the times and places of registration and thus perpetuated the effects of past discriminatory practices.[103] Under these circumstances the district court was clearly justified in finding that minority registration levels remained depressed because of past discriminatory practices.

103 In a number of instances registration was restricted to the county courthouse, locations that especially burdened the large numbers of blacks who did not own cars. JA 220-22, 229; JA Ex. Vol. I Ex. 37-52. Local election officials severely limited the activities of voluntary or part-time registrars, only allowing them, for example, to register new voters outside his or her own precinct when the state board of elections required them to do so. T. 525, 553-55; JA 212, 222-24.

C. Evidence of Economic and Educational Disadvantages

The district court concluded that minority voters were substantially impeded in their efforts to elect candidates of their choice by the continuing effects of the pervasive discrimination that affected, and to a significant degree continues to affect, every aspect of their lives. JA 28-31.

The court concluded that past discrimination had led to a variety of social and economic disparities.[104] Such

104 The mean income of black citizens was only 64.9% that of white citizens. Approximately 30% of all blacks have incomes below the poverty level, compared to only 10% of whites; conversely, the proportion of whites earning over $20,000 a year is twice that of blacks. JA 30. Since significant desegregation did not occur in North Carolina until the early 1970's, most black adults attended schools that were both segregated and qualitatively inferior for all or most of their primary and secondary education. JA 29. See Gaston County v United States, 395 U.S.

social and economic disparities were cited by Congress as a major cause of unequal opportunity in multi-member districts. S. Rep. 29.[105] Appellees adduced evidence documenting these disparities in each of

285, 292-96 (1969). Residential housing is rigidly segregated throughout the state, JA 29, and is almost total in each of the challenged districts. T. 268, 648, 739; JA 176-7, 201-2, 219, 240, 263-4; JA Ex. Vol. II, Px 3a-8a.

105 Congress deemed evidence of substantial social and economic disparities sufficient by itself to demonstrate that blacks would be at a significant disadvantage in a majority white district. The Senate Report directs the courts to presume, where those disparities are present, that "disproportionate education, employment, income level and living conditions arising from past discrimination tend to depress minority political participation..." Id. 29 n.114. The propriety of such an inference was an established part of the pre-Bolden case law expressly referred to by Congress, and is an established part of the post-amendment section 2 case law as well. United States v. Marengo County, 731 F.2d at 1567-68. See also McMillan v. Escambia County, 748 F.2d at 1044; United States v. Dallas County, 739 F.2d 1529, 1537 (11th Cir. 1984).

the challenged districts[106] and appellants do not dispute their existence.

Appellants attack the district court's finding that these undisputed disparities substantially impeded the ability of blacks to participate effectively in the political process, asserting that "plaintiffs failed to prove that political participation on the part of blacks in North Carolina was ... in any way hindered." A. Br. 30. But appellees in fact introduced the evidence which

106 Mecklenburg County: T. 243, 436; JA Ex. Vol. I Ex. 37; JA 77-89.

Durham County: T. 647-51, 686; JA Ex. Vol. I Ex. 39; JA 77-89.

Forsyth County: T. 595-96, 611, 734; JA Ex. Vol. I Ex. 38; Hauser deposition 35, 36, 38

Wake County: T. 130, 1216-18; JA Ex. Vol. I Ex. 40; JA 77-89.

House District 8: T. 701-03, 740-41, 742-44; JA Ex. Vol. I Ex. 41-43; JA 77-89.

appellants assert was missing, documenting in detail precisely how the admitted disparities impeded the electoral effectiveness of black voters. That evidence demonstrated that the cost of campaigns was substantially greater in large multi-member districts, and that comparatively poor black voters were less able than whites to provide the financial contributions necessary for a successful campaign.[107] Minority voters were far less likely than whites to own or have access to a car, without which it was often difficult or impossible to reach polling

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107 T. 130; JA 177-78, 180-1, 235-6; JA Ex. Vol. I Ex. 14-17; Hauser Deposition, 35. There was also more general testimony regarding the net impact of these disparities. JA 168, 213-14; 236-7. See David v. Garrison, 553 F.2d 923, 927, 929 (5th Cir. 1977); Dove v. Moore, 539 F.2d 1152, 1154 n.3 (8thCir. 1976); Hendrick v. Walder, 527 F.2d 44, 50 (7th Cir. 1975).

places or registration sites.[108] Minority candidates, living in racially segregated neighborhoods and a racially segregated society, had far less opportunity than white candidates to gain exposure and develop support among the majority of the voters who were white.[109]

Appellants urge that this evidence was rebutted by the fact that eight witnesses called by appellees were politically active blacks. A. Br. 29-30. But the issue in a section 2 dilution proceeding is not whether any blacks are participants in any way in the political process,

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108 T. 634, 686; JA 77; JA Ex. Vol. I Ex. 37-52. The district court noted that 25 % of all black families, compared to 7.3% of white families, have no private vehicle available for transportation. JA 30.

109 T.782; JA 176-81, 213-14, 239.

but whether those who participate have an equal opportunity to elect candidates of their choice. The mere fact that eight or even more blacks simply participate in the electoral process does not, by itself, support any particular conclusion regarding the existence of such equal opportunity. In this case the instances cited by appellants as the best examples of the degree to which the political process is open to blacks actually tend to support the trial court's conclusions to the contrary. All the specific political organizations which appellants insist blacks are able to participate in are either civil rights or black organizations;[110] only two of the individuals cited

[110] The organizations refered to by appellants are the Nash County NAACP, the Mecklenburg County Black Caucus, the Second Congressional District Black Caucus, the Durham Committee on the Affairs of Black People, the Wilson Committee on the Affairs of Black People, the Raleigh-Wake Citizens Association, the Black Women's Political Caucus, and the Wake County Democratic Black Caucus. A. Br. 11-12, 30.

by appellants held elective office, and both positions were chosen in majority black single member districts.[111]

D. Evidence of Racial Appeals by White Candidates

The district court concluded that the ability of minority voters to elect candidates of their choice was significantly impaired by a statewide history of white candidates urging white voters to vote against black candidates or against white candidates supported by black voters:

> [R]acial appeals in North Carolina political campaigns have for the past thirty years been widespread and persistent .... [T]he historic use of racial appeals in political campaigns in North Carolina persists to the present time and

[111] JA 108, Stip. 143; JA 201, 237.

> ... its effect is presently to lessen to some degree the opportunity of black citizens to participate effectively in the political process and to elect candidates of their choice. JA 34.

Congress noted that the use of such racial appeals to white voters might make it particularly difficult for black candidates to be elected from majority white districts. Senate Report 29. The noxious effects of such appeals are not limited to the particular election in which they are made; white voters, once persuaded to vote against a candidate because of his or her race or the race of his or her supporters, may well vote in a similar manner in subsequent races. JA 34.[112]

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112 "The contents of these materials reveal an unmistakable intention by their disseminators to exploit existing fears and prejudices and to create new fears and prejudices" toward black political participation. Id. According to a black witness at trial, one of the biggest obstacles to black candidates is "convincing the white voter that there is nothing to fear from having blacks serve in elective office." JA 179.

Appellants object that, of the six elections referred to by the district court as involving racial appeals, only two occurred within the last 15 years. A. Br. 32a. But these particular elections were not cited by the trial court as the sole instances of racial appeals. Rather, those six elections were listed as the most blatant examples, JA 34, and the opinion added that "[n]umerous other examples of ... racial appeals in a great number of local and statewide elections abound in the record." Id. Among the additional instances of racial appeals documented in the record referred to by the district court are elections in 1976,[113] 1980,[114] and 1982.[115]

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113 T. 330-38, 390-91; Px 44.

114 T. 356-358.

Appellants also urge that the presence of racial appeals cannot be proved merely by evidence as to the content of the advertisements or literature used by white candidates; rather, they assert, some form of in depth public opinion poll must be conducted to demonstrate what meaning white voters acknowledge attaching to the racist materials used by white candidates. A. Br. 31-32. Public opinion polls are not, however, the ordinary method of establishing the meaning of disputed documents; indeed, if racial appeals have been effective, the white voters to whom those appeals were addressed are unlikely to discuss the matter with complete candor. Local federal judges, with personal knowledge of

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115 T. 354, 357-69; JA 164-67; ;JA Ex. Vol. I Ex. 23-26, 36.

the English language and the culture in which they live, are entirely competent to comprehend the meaning of the spoken and written word in a wide variety of contexts, including political appeals. No public opinion poll is necessary to understand the significance of appeals such as "White People Wake Up", T. 245-46; JA Ex. Vol. I Ex. 21, or to realize why, although typically unwilling to provide free publicity to an opponent, a candidate would publicize a photograph of his opponent meeting with a black leader. T. 356-58; JA 166-67; JA Ex. Vol. I Ex. 36. Indeed, these judges, all North Carolina natives conversant with local social and political realities, were able to determine that recent racial appeals, while at times "less gross and virulent," JA 33, "pick up on the same obvious themes": "black domination" over "moderate" white

candidates and the threat of "negro rule" or "black power" by blacks "bloc" voting. Id.[116]

E. Evidence of Polarized Voting

The sufficiency of the evidence supporting the district court's finding of polarized voting is set out at pp. 88-95, supra .

F. The Majority Vote Requirement

The district court found that the majority runoff requirement impaired the ability of blacks to elect candidates of their choice from the disputed districts. JA 31-32. Although no black candidate seeking election to one of the at-large

116 For example, using a frequent pun for black, a candidate in 1982 in Durham denounced his black opponent for "bussing" [sic] his "block" vote to the polls. JA Ex. Vol. I Ex. 23-26.

seats has ever been forced into a runoff because of this rule, A. Br. 27, the issue at trial was not whether the runoff rule had led directly to the defeat of black legislative candidates, but whether that rule indirectly interfered with the ability of minority voters to elect candidates of their choice. The majority vote requirement has prevented black citizens from being elected to statewide, congressional, and local level positions, T. 958-959, 967, JA 203-4; Dx 48, p. 20. The exclusion of blacks from these offices has operated indirectly to interfere with the ability of blacks to win legislative

elections.[117] The court's findings have a substantial basis in the record and corroborate Congress' concern that in vote dilution cases, majority vote requirements are "typical factors" which "may enhance the opportunity for discrimination against the minority group." Senate Report at 29.[118]

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117 Because of the effect of the runoff requirement in state and local offices, black voters were deprived of an opportunity to prepare for legislative elections by winning local office, of the possible assistance of minority officials in higher office, and of a pool of experienced minority campaign workers. T. 142, 192, 960, 967; JA 175-77, 179-80.

118 This Court has also recognized the discriminatory potential of runoff requirements. See, e.g., City of Port Arthur v. United States, 459 U.S. 159 (1982); City of Rome v. United States, 446 U.S. 156, 183-84 (1980).

G. Evidence Regarding Electoral Success of Minority Candidates

Having identified a number of specific aspects of the challenged at-large systems which interfered with the ability of blacks to participate in the political process or elect candidates of their choice, the district court examined as well actual election outcomes to ascertain the net impact of those practices. The court concluded:

> [T]he success that has been achieved by black candidates to date is, standing alone, too minimal in total numbers and too recent in relation to the long history of complete denial of any elective opportunities to compel or even to arguably support an ultimate finding that a black candidate's race is no longer a significant adverse factor in the political processes of the state -- either generally or specifically in the areas of the challenged districts. JA 39-40.

Much of the argument advanced by both appellants and the Solicitor General is an attack on this factual finding.

As the facts stood in September, 1981, when this action was filed, the correctness of this finding could not seriously have been disputed. Prior to 1972 no black candidate had ever been elected from any of the six disputed multi-member districts. From 1972-1980 no black representatives served in at least three of the districts; far from having, as the Solicitor suggests, a level of representation comparable to their proportion of the population, at any given point in time, prior to 1982 more than two-thirds of the black voters had no elected black representatives at all. In six of the disputed districts, with an average black population of well over 25%, a total of 30 legislators were elected at

large. Prior to 1982 no more than two or three black candidates were successful in any election year.[119]

Appellants rely solely on the results of the 1982 elections in attacking the findings of the district court. The outcome of the 1982 elections, held some 14 months after the filing of this action, were strikingly different than past elections. Although in 1980 only two districts had elected black candidates, four of the districts did so in 1982. For the first time in North Carolina history two blacks were elected simultaneously from the same multi-member legislative district, resulting in five black legislators.[120]

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[119] Statewide, the number of black elected officials remains quite low, and has not increased significantly since 1975. JA 35; JA Ex. Vol. I Ex. 22.

[120] Although appellees state that seven blacks were elected in 1982, two were elected

Appellants contended at trial that the 1982 elections demonstrated that any discriminatory effect of the at-large systems had, at least since the filing of the complaint, disappeared. The district court expressly rejected that contention:

> There are intimations from recent history, particularly from the 1982 elections, that a more substantial breakthrough of success could be imminent --but there were enough obviously aberrational aspects present in the most recent elections to make that a matter of sheer speculation. JA 39.

The central issue regarding the significance of minority electoral success is whether the district courts' evaluation of the obviously unusual 1982 election results was clearly erroneous. The parties offered at trial conflicting evidence

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from majority black House districts in section 5 covered counties which although they include some counties in Senate District 2, are not in question here. Stip. 95, JA 94; JA 35.

regarding the significance of the 1982 elections.[121] The evidence suggesting that the 1982 elections were an aberration was manifestly sufficient to support the trial court's conclusion. First, as the district court noted, there was evidence that white political leaders, who had previously supported only white candidates, for the first time gave substantial assistance to black candidates and did so for the

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121 In Forsyth County, for example, appellants pointed to isolated instances of electoral success prior to 1982 which the court weighed in conjunction with evidence of electoral failures such as the defeat of all black Democratic candidates, including appointed incumbents, in 1978 and 1980, years in which all white Democrats were successful. JA 37. In House District No. 8, which is 39% black in population, no black had ever been elected and from Mecklenburg, in the eight member House and four member Senate districts, only one black senator (1975-1979) and no black representatives had been elected this century prior to 1982. JA 36. Moreover, as in Forsyth, in general elections wherever there was a black Democrat running, black Democrats were the only Democrats to lose to Republicans. JA 135.

purpose of influencing this litigation and preventing the introduction of single member districts.[122] Second, in Mecklenburg County there were fewer white candidates than there were seats, thus assuring that a black candidate would win the primary.[123] Third, conversely, in Forsyth County there was such a surfeit of white candidates that the splintering of the white vote gave blacks an unusual opportunity.[124]

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122 Hauser Deposition, 49; JA 259-60.

123 JA 44. Moreover, the black candidate who lost in the general election was the only Democratic candidate to lose. In House District 23, there were only 2 white candidates for 3 seats in the 1982 primary, and the black candidate who won ran essentially unopposed in the general election, but still received only 43% of the white vote. JA 46, 142-3, 153.

124 JA 137--8. There were 9 white Democratic candidates, none of them incumbents, running for 5 seats. Appellees' expert testified that the likelihood of two blacks getting elected again in the multi-member district was "very close to zero." Id.

Fourth, in 1982, as occurs only once every six years, there was no statewide race for either President or United States Senate, as a result of which white and Republican turnout was unusually low.[125] Fifth, in one county, black leaders had been able to bring about the election of a black legislator only by selecting a candidate who had not been visibly outspoken about the interests of the black community.[126] Finally, in a number of instances black candidates won solely because black voters in unprecedented numbers resorted to

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125 T.142-144, 179; JA 137-39, 140. White turnout was 20% lower than in 1980.

126 Hauser Deposition 42-43;JA 205-6. The ability of some blacks to get elected does not mean they are the representatives of choice of black voters. T 691, 1291-4, 1299; JA 214-15.

single shot voting, forfeiting their right to participate in most of the legislative elections in order to have some opportunity of prevailing in a single race.[127]

The success of black candidates in 1982 was viewed by the court as a concatenation of these various factors, each of which either was a freak occurrence

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127 Experts for both appellants and appellees agreed that black voters had to single shot vote in order to elect black candidates in the districts at issue. T. 797-8; JA 136, 148-49, 150, 278-79. Lay witnesses for both parties also agreed that the victories of black candidates were due in large measure to extensive single shot voting by blacks. T. 1099; JA 228, 258-59.

over which appellees had no control,[128] or in and of itself underscored the inequality in the multi-member election system.[129]

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128 The likelihood, for example, of repeating successfully the 1982 election of blacks in the challenged Forsyth House District was "very close to zero." JA 137. Moreover, unlike white Democrats, not a single one of whom lost in the 1982 general elections, black Democrats in the other districts still enjoyed only haphazard success. Thus, the court was not presented with the fact situation of Whitcomb v. Chavis, 403 U.S. 124 (1971).

129 The necessity of single shot voting is a distinct handicap because it exacerbates the competitive disadvantage minority voters already suffer because of their numerical submergence. White voters get to influence the election of all candidates in the multi-seat system, whereas blacks must relinquish any opportunity to influence the choice of other representatives in order to concentrate their votes on the minority candidate. As a result, white candidates can ignore the interests of the black community with impunity. See discussion supra at 59-62.

H. Responsiveness

Appellees did not attempt to prove the unresponsiveness of individual elected officials. In a section 2 case unresponsiveness is not an essential part of plaintiff's case.[130] Senate Report 29 n.116;[131] Appellants' de minimus evidence

130 This Court held in Rogers v. Lodge, 458 U.S. 613, 625 n.9, that unresponsiveness is not an essential factor in establishing a claim of intentional vote dilution under the Fourteenth Amendment.

131 Because section 2 protects the right to participate in the process of government, "not simply access to the fruits of government", and because "the subjectiveness of determining responsiveness" is at odds with the Congressional emphasis, a showing of unresponsiveness might have some probative value, but a showing of responsiveness has little. United States v. Marengo County, 731 F.2d at 1572. See also Jones v. Lubbock County, 727 F.2d at 381, 383 (upholding a violation of section 2 despite a finding of responsiveness); McMillan v. Escambia County, 748 F.2d at 1045-1046.

of responsiveness[132] may be relevant rebuttal evidence, but only if appellees had attempted at trial to prove unresponsiveness. Id.

I. Tenuousness of the State Policy for Multimember Districts

The district court correctly recognized that while departure from established state policy may be probative of a

132 The only testimony cited to support their assertion that appellees' "witnesses conceded that their legislators were responsive", A. Br. 32, was the testimony of one witness who testified on cross-examination that of twelve Representatives and Senators from Mecklenburg County, two, the black representative and one white representative, were responsive. JA 184-86. The only other evidence was the self serving testimony of one defense witness, listed in toto in footnote 14 to appellants' brief. Furthermore, appellants assertion that white representatives must be responsive because "white candidates need black support to win" A. Br. at 34, is not supported by the record. In the challenged districts, white candidates consistently won without support from black voters. See, supra, 62 n.69; JA 231-2.

violation of section 2, a consistently applied race neutral policy does not negate appellees' showing, through other factors, that the challenged practice has a discriminatory result. JA 51, citing S. Rep. at 29, n.117.

In this case, the district court did not find the application of a consistent, race-neutral state policy. In fact, after the Attorney General in 1981 objected under section 5 to the 1967 prohibition against dividing counties, both covered counties and counties not covered by section 5 were divided.[133] JA 52.

The Attorney General found that the use of large multi-member districts "necessarily submerges" concentrations of black voters in the section 5 covered counties. Based on the totality of

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133 The challenged plan divided nineteen counties not covered by Section 5.

relevant circumstances, the court below similarly concluded that, in the non-covered counties as well, black citizens have less opportunity than white citizens to participate in the challenged majority white multi-member districts and to elect representatives of their choice.

The decision of the district court rests on an exhaustive analysis of the electoral conditions in each of the challenged districts. The lower court made detailed findings identifying the specific obstacles which impaired the ability of minority voters to elect candidates of their choice in those districts. The trial court held

> ... the creation of each of the multi-member districts challenged in this action results in the black registered voters of that district ... having less opportunity than do other members of the electorate to participate in the political

process and to elect representatives of their choice. JA 54.

This ultimate finding of fact, unless clearly erroneous, is sufficient as a matter of law to require a finding of liability under section 2.

CONCLUSION

The decision of the three judge district court should be affirmed.

Respectfully submitted,

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DATED: AUGUST 30, 1985